85-1306

Supreme Court, U.S.
F I L E D
JAN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

VINCENT GONZALEZ,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION

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QUESTIONS PRESENTED

1) What standard must be met under a Fourth and Fourteenth Amendment challenge to the truthfulness of factual statements in an affidavit in support of a warrant?

2) Is a finding that the factual information is false and the false information was not provided to an officer by the informant sufficient to mandate suppression under the Fourth and Fourteenth Amendments though the affidavit was prepared by another officer?

3) When an officer prepares an affidavit in support of a warrant relying upon information known to another officer, is he bound by the information known to that other officer?

4) Do the Fourth and Fourteenth Amendments permit deceptive statements in an affidavit in support of a warrant which mis-

lead the judge in assessing the credibility of the information provided?

5) Do the Fourth and Fourteenth Amendments permit the installation of a pen register which permits complete eavesdropping in the discretion of the police officer, without a warrant?

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IN THE

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OCTOBER TERM 1985

VINCENT GONZALEZ,

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Respondent.

OPINIONS BELOW

The opinion of the trial court is unreported and is reproduced in the Appendix. The opinion of the Appellate Division is reported at _____AD2d _____ _____NYS2d _____. Leave to appeal to the Court of Appeals was denied by Hon. Judith Kaye by certificate dated December 3, 1985 and is reported at _____NY2d _____,_____NYS 2d _____.

JURISDICTION

i) Leave to appeal to the Court of Appeals was denied on December 3, 1985.

iv) 28 USC 1257

CONSTITUTIONAL PROVISIONS

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FACTS

Det. Andrew Panessa of the New Rochelle Police Department obtained certain information from F.B.I. Agent David Clark on March 12, 1982 which indicated that a close associate of the defendant, William Nicastro, would be receiving a shipment of ounces of cocaine. Basically all of the other details of that conversation, and one on March 16, 1982, differ in the recita-

tions by Det. Panessa and Agent Clark.

Det. Panessa began an investigation. He first sought a lease line for a pen register on Nicastro's phone and when that was not productive, on May 26, 1982, obtained one for the defendant's phone. The pen register was installed on June 8, 1982 and on July 9, 1982, an eavesdropping warrant was signed. On August 3, 1982, a search warrant was issued, based upon the conversations overheard under the eavesdropping warrant, and on August 4, 1982, the search warrant was executed and the defendant arrested.

The defendant entered a plea of guilty to certain counts of the indictment preserving his Fourth and Fourteenth Amendment arguments.

THE ISSUES PRESENTED

The defendant first raised the issue of the falsity of the statements contained in the affidavit in support of the warrant by pre-trial motion to suppress and of the pen register during the hearing ordered on that motion. Both issues were raised on appeal to the Appellate Division and on application for leave to appeal to the Court of Appeals. The defendant's motions were denied by the trial court and the trial court's denial was affirmed by the Appellate Division.

THE EAVESDROPPING WARRANT WAS ISSUED IN VIOLATION OF THE FOURTH & FOURTEENTH ADMENDMENTS

Agent Clark received information from a CI that a delivery of 6-7 ounces of cocaine would be made that night, March 12, 1982,

to Bill Nicastro[1]. He relayed that information to Det. Panessa, and told him that the CI did not know Nicastro's source. Det. Panessa asked Agent Clark to see if he could find out who the source was. On March 16, the CI told Agent Clark that he did not know who made the delivery on the 12th[2] but that Frank Spinelli had been supplying Nicastro for over a year and that information was relayed to Det. Panessa. The CI did not say that he had been present at any delivery on the 12th, or that he had ever been present at any delivery to the defendant.

The information obtained by Agent Clark was not sufficient to support the issuance

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[1]He originally had Decastro but much later learned the name was Nicastro.

[2]Agent Clark didn't think he knew whether or not a delivery had been made.

of any warrant and the relaying of that information to Det. Panessa did not improve its worth (Whitely v. Warden, 401 US 560 [1971]).

In preparing his affidavit in support of the eavesdropping warrant, Det. Panessa related the information from Agent Clark as, "in March 1982 ..... Spinelli delivered approximately seven ounces of cocaine to Gonzalez and Nicastro ..... The basis of the CI'l's information is personal knowledge in that he saw the transaction, overheard conversation, and heard admissions. ...."[3].

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[3]In an affidavit in support of a pen register for defendant's phone, it was stated, "Agent Clark informed Det. Panessa that his informant was present at Bottoms Up on March 14, 1982, when, at about midnight, Nicastro in Gonzalez's presence received approximately seven (7) ounces of cocaine". The Agent mentioned only March 12.

As Frank Spinelli was in federal custody from February 2, 1982 to November 5, 1982, it is clear that the transaction described by Det. Panessa did not occur.

There is no demonstrably false statement in the information Agent Clark testified he received from the CI. The falsity arises either in the information conveyed by Agent Clark to Det. Panessa[4] or in Det. Panessa's preparation of the affidavit. If the falsity was by Agent Clark, it was deliberate as he did not receive the information from his informant and that falsity cannot be insulated by relaying it through Det. Panessa (Franks v. Delaware,

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[4]Agent Clark testified that he gave Det. Panessa only the information received from the CI and Det. Panessa testified that he received the information in the affidavit from Agent Clark.

438 US 154, ftnte 6 [1978]); Whitely v. Warden, supra). If Agent Clark conveyed only the information received from the CI, Det. Panessa deliberately falsified the infomation.

After a hearing, the judge found that, "it is beyond dispute that there are inaccurate statements in the affidavit", "there are discrepancies between the information relayed by CI-1 to Agent Clark and the presentation of that information by Det. Panessa with the assistance of (ADA) Bisordi, in the affidavit", and "both law enforcement officers are credible". He attributed the change of information between that conveyed by the CI and that presented to the court "to the relaying of information through various persons, that is, the distortions arose from the conveyance of information and not from lying or a wilful

or reckless disregard for the truth".

To change a story from that told by the CI to that presented to the court is at best reckless, and it matters not to which officer the recklessness is attributed. The State is responsible for the reckless disregard for the truth or the perjury, whichever it may be and wherever the fault lies. The Fourth Amendment is meaningless if a defendant must prove more than that the person to whom a statement is attributed did not make the statement and that the statement itself is false.

In support of his application for an eavesdropping warrant, Det. Panessa also relied upon information from Det. Robert Curasi.

> "Further, a New Rochelle police officer, Det. Robert Curasi, working in an undercover capacity, learned the following: the owner of

> Pelham Meateria, 45 Fifth Avenue, Pelham, stated to Curasi, on more than one occasion, that he uses cocaine and that his supplier is a man called Vincent. He has also said he gets 'dynamite stuff' (referring to coke) from Vinnie"

Det. Curasi worked at the Pelham Meateria, off and on, for twenty years as a butcher and it was while he was working there that he became a police officer. Both Det. Panessa and A.D.A. Bisordi who prepared his affidavit were aware of the fact that Det. Curasi was working a second job at the Pelham Meateria and that the owner knew that he was a police officer[5]

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[5]Allegedly there was a Department policy of referring to officers as working undercover when they obtained information when not on duty, but that fact was not given to the A.D.A.

Det. Panessa also set forth a conversation overheard by Det. Curasi, an hour after the pen register was installed on defendant's phone[6]

> "On June 8, 1982, at approximately 12:00 p.m. (noon), the Detective overheard the owner call and ask someone for Vincent. It was a short call and the owner stated he needed the stuff by 4:00 p.m.[7]. At the time the call was made, Det. Curasi saw it was a local call and observed the first four numbers dialed to be 632-7, which are the first four numbers of Gonzalez' home number".

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[6]The pen register was installed that day about 11:00 a.m. and an incoming call recorded at 12:02 p.m.

[7]Det. Curasi testified that the owner only uses cocaine on weekends but the conversation took place on a Tuesday.

In conversations, overheard pursuant to the order in question, between the owner and the defendant, the defendant was always referred to by his nickname, "Tut", not Vince or Vincent.

The deceptive, and false reference to Det. Curasi as "working in an undercover capacity" precluded the issuing judge from making an independent and objective assessment of the information provided. While the judge might fully credit the story as told, had he been told the true circumstances under which the information was obtained and the fact that the pen register was installed only one hour before the overheard call, he may well have discredited the information as incredible.

The false representation mandates suppression not only of the proven falsity, i.e., undercover, but of the entire infor-

mation provided.

The defendant in this as well as any case, is severely limited in his ability to prove any falsities in an officer's affidavit. Here the defendant was able to prove that Spinelli[8] was incarcerated at the time he allegedly made the cocaine sale and that Det. Curasi was employed by the Pelham Meateria[9], material facts on the two material allegations in Det. Panessa's affidavit. The defendant cannot prove whether Agent Clark lied to protect his informant, whether Det. Panessa lied to make his case

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[8]His attorney represented Spinelli on an unrelated charge prosecuted by the district attorney. It was through that charge (disposed of on March 23, 1982) that defense counsel and the district attorney learned of Spinelli's incarceration. As members of his staff knew Spinelli was incarcerated and that knowledge is imputed to him the District Attorney knowingly submitted a false affidavit to the Court.

[9]The defendant knew the owner.

or whether one or both were reckless with their information. The Fourth Amendment does not require the defendant to prove which law enforcement officer falsified the evidence, how or why, but only that the falsification is attributable to a law enforcement officer.

The information attributable to CI-1 and Det. Curasi cannot be considered on the issue of probable cause. The State courts did not consider whether the other information standing alone would be sufficient to support the warrant but upon the demonstrable falsity of the two principal sources of information, the warrant must fall.

A PEN REGISTER REQUIRES
A WARRANT AND COMPLIANCE
WITH TITLE THREE

Det. Panessa testified:

"Q. When you installed a

PEN register in this case, did that PEN register have the capability or ability to overhear conversations that were occurring on the telephone?

A. The PEN register installed in the investigation did not have an audio output, but you can listen to PEN registers on anyone's phone.

Q. How is that done?

A. If you have the audio output attached.

Q. Now, specifically as to this wire tap, this PEN register that you referred to in your testimony, did that have an audio output?

A. No, it did not.

Q. Could you monitor or intercept or listen to the telephone conversations using that PEN register?

A. Yes, you could if you had a set with a clip on it to clip into the PEN register."

"Q. Prior to that (July 9, 1982), had you or any other

officer listened to the conversations?

A. No, because on July 9th we changed the PEN register and put a different type on that actually had the audio output. We started to record."

The decisions of this Court and the New York courts assume that the only information received from a pen register is that which might be referred to as basic telephone company billing information (Smith v. Maryland, 442 US 736 [1979]) and that there is no interception of conversations (US v. NY Telephone Co., 434 US 159 [1977]). That is not true.

As Det. Panessa testified, there are two types of pen registeres, one of which intercepts conversations. But, even the other can easily be made, in secret, to intercept. The Fourth Amendment requires a

warrant issued upon probable cause[10] when the officer, based upon his determination of what equipment[11] to use, has the ability, apparently sanctioned by the courts, to intercept and overhear conversations. That is more particularly true in a case, such as this, where a lease line is obtained and the pen register installed in a secret place accessible only to the police.

CONCLUSION

The petition for a writ of certiorari should be granted and the case remanded with instructions to vacate the warrant.

Respectfully submitted,

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[10]And in compliance with Title III.

[11]There has never been a determination as to what type of pen register equipment can be used.

A - September 30, 1985

_____AD2d_____

1909 E

The People, etc., respondent, v Vincent Gonzalez, appellant. (Ind. No. 82-00956)

Morosco & Cunard, White Plains, N.Y. (Janet E. Cunard of counsel), for appellant.

Carl A. Vergari, District Attorney, White Plains, N.Y. (Lois A. Cullen and Anthony J. Servino of counsel; Karen Stefflre on the brief), for respondent.

Appeal by defendant from a judgment of the County Court, Westchester County (Nicolai, J.), rendered October 31, 1984, convicting him of criminal possession of acontrolled substance in the third degree (two counts), criminal possession of a weapon in the third degree, conspiracy in the fourth degree (three counts), and criminal possession of marijuana in the fifth degree, upon his plea of guilty, and imposing sentence.

Judgment affirmed. This case is remitted to the County Court, Westchester County, for further proceedings pursuant to CPL 460.50(5).

The record supports the determination that defendant failed to meet his burden of proof, by a preponderance of the evidence, that a police officer's affidavit in support of the application for an eavesdropping warrant contained perjured inaccuracies or misstatements made with a reckless disregard for the truth (see, e.g., Franks v Delaware, 438 US 154; People v Ingram, 79 AD2d 1088; cf. People v Alfinito, 16 NY2d 181). Furthermore, defendant's contention that the use of a lease-line in order to install a pen register requires a warrant issued upon a finding of probable cause is in error (see, Smith v Maryland, 442 US 735; cf. United States v. New York Tel. Co., 434

US 159). State law does not require the additional safeguard of an order issued upon probable cause (People v Guerra, 65 NY2d 60).

We have examined defendant's remaining contentions and find them to be without merit.

MANGANO, JP., THOMPSON, BROWN and EIBER, JJ. concur.

October 21, 1985 PEOPLE v GONZALEZ, VINCENT

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ROBERT T. CHOFLET, VINCENT GONZALEZ, RICHARD IANNUZZI and JOHN P. CHIDO,

Defendants.

----------X

DECISION AND ORDER

Indictments No.
82-00955
00956
00957
00976

NICOLAI, J.

Pursuant to an order of the Hon. Nicholas Colabella dated January 20, 1983 and commencing on October 18, 1983 and continued on various dates, an Alfinito hearing was held before me. The people and defendants have submitted memoranda of law and due deliberation having been had, I reach the following conclusions.

The sole purpose of this hearing was to determine whether the false statements in the application for the eavesdropping warrant were perjurious or made with reckless disregard for the truth, and, if so, were

such statements necessary to a finding of probable cause to issue the warrant. Franks v. Delaware, 438 U.S. 154, People v. Alfinito, 16 N.Y. 2d 181. The burden is on the defendants to prove the perjury (or willful disregard) and any "fair doubt" must be resolved in favor of the warrant. Franks v. Delaware, supra, 155-156; People v. Alfinito supra at 186; People v. Ingram, 79 A.D. 2d 1088.

It is beyond dispute that there are inaccurate statements in the affidavit of Detective Andrew Panessa, which was submitted in support of the application for an eavesdropping warrant. Particularly, there are misstatements of fact regarding information received from an informant referred to as CI-1

The testimony at the hearing shows that on March 12, 1982 Detective Panessa received

a telephone call from F.B.I. Special Agent David Clark. Agent Clark had received certain information from a confidential informant regarding a cocaine transaction which was to take place that evening at the Bottoms Up Bar in New Rochelle. The informant had learned from "Tut" Gonzalez that Billy Nicastro was to receive six or seven ounces of cocaine at the bar sometime during the evening of March 12, 1982. CI-1 also revealed that Gonzalez was a close associate of Nicastro, that the association was for the purpose of distributing cocaine and that Gonzalez had been involved in cocaine distribution at another New Rochelle bar, Capricorns.

On March 16, 1982 Detective Panessa and Agent Clark again conversed. Clark had, in the interim, again conversed with CI-1 and relayed to Panessa that information. Clark

had learned that Frank Spinelli had supplied Nicastro with cocaine two or three times a month, usually on weekends, for over a year. The informant had been present on some occasions when Spinelli had made these deliveries but was not there on March 12, 1984 [sic] for the delivery of the six or seven ounces. The informant had also had several conversations with Gonzalez concerning the latter's involvement. The conversations and observations formed the basis for CI-1's information.

It was Det. Panessa's understanding of these conversations that Spinelli had delivered cocaine to Nicastro and Gonzalez on either March 13 or 14, 1984 [sic] and that such delivery had been observed by CI-1. In his affidavit prepared in July, 1982 with the aid of former Assistant District Attorney Thomas Bisordi, Detective Panessa

deposes as follows:

> "In March of 1982, your deponent received information from a reliable informant, hereinafter referred to as CI-1. In the past CI-1 has provided reliable information to the FBI.
>
> ***
>
> CI-1 stated that Vincent "Tut" Gonzelez, William Nicastro and Frank Spinelli meet two or three times a month, at which time a transfer of cocaine (ounces) occurs. Spinelli supplies it to Gonzalez and Nicastro and the meetings take place at the Bottoms-Up Bar*. At this time Spinelli delivered approximately seven ounces of cocaine to Gonzalez and Nicastro. CI-1 did not state whether money was transferred at that time. The basis of the CI'1's information is personal knowledge in that he saw the transaction, overheard conversation, and heard admissions from Gonzalez and Nicastro concerning the transactions, and Gonzalez is known by him to use the name Tut.

*Missing in original: "10 South Division Street, New Rochelle, New York. One meeting occurred in March 1982 at the Bottoms-Up Bar"

> Thus, there is probable cause to believe that Gonzalez, Nicastro and Spinelli are participating in illegal narcotic activities involving the possession and distribution of cocaine."

Clearly there are discrepancies between the information relayed by CI-1 to Agent Clark and the presentation of that information by Det. Panessa, with the assistance of Mr. Bisordi, in the affidavit.* However, this Court has had the opportunity to observe the demeanor of both Detective Panessa and Agent Clark, as well as the members of the District Attorney's office who were involved in the inital stages of this investigation, during a lengthy hearing. And the

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*In his affidavit, Det. Panessa specifically attributes his information concerning CI-1's reliability to Agent Clark. He is not as specific in attributing the source of the information, but the Court concludes that was failure of style, not an attempt to mislead.

Court is convinced that both law enforcement officers are credible and that the discrepancies are attributable to the relaying of information through various persons. That is, the distortions arose from the conveyance of information and not from lying or a wilful or reckless disregard for the truth.

The fact, adduced at the hearing, that Frank Spinelli was in federal custody in March, 1982 is not of great moment. Det. Panessa was not aware of this fact from March through July of that year. He did review documents available to him concerning Mr. Spinelli's status, but those documents did not provide information about Spinelli's incarceration, and again, this Court finds that Det. Panessa's affidavit is based on the facts as Det. Panessa believed them truly to be. Again, the issue before this

Court is not the accuracy of the information supplied or the veracity of the informant, but only the truthfulness of the affiant. People v. Solomine, 18 N.Y.2d 477.

Defendants argue that Assistant District Attorney John George's knowledge of Spinelli's incarceration must be imputed to everyone in the District Attorney's office and such imputation renders the application false as a matter of law. The argument must fail. While there are situations in which knowledge of one member of the District Attorney's office will be imputed (See e.g. People v. Simmons, 36 N.Y.2d 126), this Court is not persuaded that this is such a situation. It is clear from the testimony at the hearing that neither Carl Vergari nor Thomas Bisordi were actually aware of Spinelli's status, and, therefore, Mr. Vergari did not know that the statements

in Det. Panessa's affidavit were incorrect.

Although Det. Panessa had not yet signed his affidavit when Mr. Vergari swore to the application, the application is not rendered false.

There is no requirement that the supporting affidavit be sworn before the application. Both were executed prior to the issuing Judge signing the warrant and so the affidavit was an affidavit prior to the issuance of the warrant. Such hypertechnical arguments cannot defeat a warrant. See United States v. Tortorello, 480 F.2d 764, 776-778.

Defendants also urge that Det. Panessa's description of Det. Curasi as "undercover" is a falsehood. The Court does not agree. Although Det. Curasi's employer at the Meateria knew Curasi was a police officer, he

did not know Curasi was relaying information to Det. Panessa concerning cocaine transactions.

In sum, the Court finds that the defendants have failed to meet the burden of proving by a preponderence of the evidence the application is perjurious or was made with a reckless disregard for the truth and the motion to suppress on these grounds is denied. Franks v. Delaware, supra, Alfinito, supra.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
March 16, 1984

FRANCIS A. NICOLAI
J.C.C.

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

THE PEOPLE OF THE STATE OF NEW YORK	DECISION AND ORDER
- against -	Indictment No. 82-00956
VINCENT GONZALEZ, JOHN CHIDO, ROBERT CHOFLET, and RICHARD IANNUZZI,	82-00976 82-00955 82-00957

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NICOLAI, J.

In the course of an Alfinito hearing (People v. Alfinito, 16 N.Y.2d 181) held in the above-captioned matter, defendants moved, on papers, to suppress the results of a pen register surveillance on defendant Gonzalez' telephone. The people have answered, defendants have submitted a reply and the Court has heard oral argument on the motion.

Defendants' motion to suppress the results of a pen register surveillance on the telephone of defendant Gonzalez is denied.

The uncontroverted testimony at the Alfinito hearing of Detective Panessa was to

the effect that the pen register installed on defendant Gonzalez' telephone only recorded numbers dialed from the telephone and the duration of those calls and the completion and duration of incoming calls as well as the time such calls were made or completed, respectively. Although it was established that the lease line, which permitted such recording, could also be used to overhear conversations, there is no evidence to show that conversations were overheard prior to the wiretap warrant.

The Court of Appeals of this State has refused to establish a standard for the use of pen registers which is more restrictive than that which the Supreme Court has promulgated. People v. DeRaffaele, 55 N.Y.2d 234. See also People v. Gallina, 95 A.D.2d 336, 337 (footnote 1). In other words, this State follows the rule of Smith v. Mary-

land, 442 U.S. 735. In that case, the Supreme Court held that the installation and use of a pen register did not constitute a search within the meaning of the Fourth Amendment. In Smith, no court order had been obtained prior to the installation of the register. It is of no moment that an order was obtained herein. There was no legal requirement for such an order. Smith, supra, People v. Guerra, 116 Misc. 2d 272. The cases have not made distinctions between various types of pen registers and this Court declines to do so. In the absence of the need for a court order to install and use the pen register, the Court will not suppress the results of the pen register surveillance and the fruits thereof.

Additionally, this Court finds that defendants Chido, Choflet and Iannuzzi do not have standing to contest the installation

and use of a pen register on defendant Gonzalez' telephone. None of them has demonstrated any expectation of privacy in that telephone. People v. Ponder, 54 N.Y. 2d 160, U.S. v. Salvucci, 448 U.S. 83.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 28, 1983

FRANCIS A. NICOLAI
J.C.C.

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1306

IN THE

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OCTOBER TERM, 1985

VINCENT GONZALEZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Court Rules:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VINCENT GONZALEZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 22, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Preliminary Overview

Petitioner was convicted in the County Court, Westchester County, upon a plea of guilty, of the crimes of Criminal Possession of a Controlled Substance in the Third Degree (two counts), Criminal Possession of a Weapon in the Third Degree, Conspiracy in the Fourth Degree (three counts), and Criminal Possession of Marijuana. He was sentenced thereon, on October 31, 1984, to indeterminate terms of imprisonment from two to six years on each of the narcotics counts, a maximum of three years on each of the weapons and conspiracy counts, and an unconditional discharge on the marijuana count. Said sentences were decreed to run concurrently.

On October 21, 1985, this judgment of conviction was unanimously affirmed by order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. *People v. Gonzalez,* _____ A.D.2d _____. Thereafter, on December 23, 1985, the Honorable Judith Kaye issued a certificate denying leave to appeal to the New York State Court of Appeals. *People v. Gonzalez,* _____ N.Y.2d _____.

The instant petition for a writ of certiorari was received on January 30, 1986.

Facts

During the early part of 1982, an investigation concerning the illegal narcotics activities of Vincent Gonzalez, a/k/a Tut, and William Nicastro was initiated by the New Rochelle Police Department, based upon information that said individuals were "dealing in cocaine" in Westchester County and specifically in New Rochelle, New York. As part of this investigation, a pen register was installed which monitored the telephone line (914 632-7017) listed to Vincent Gonzalez at 98 Fourth Street, New Rochelle. This was accomplished by obtaining a "lease line" from the New York Telephone Company, which ran from one of the appearances for the Gonzalez telephone line to a plant where the pen register was located. The procurement of said lease line and installation of said pen register was authorized by an order of the Honorable James R. Cowhey, County Court Judge, dated May 26, 1982, upon an application of the Office of the District Attorney supported by an affidavit of Assistant District Attorney Robert A. Neary.

The pen register became operational on June 8, 1982, and continued to operate until a wiretap was installed on July 9, 1982. This device decoded and recorded numbers dialed, the length of the call,* and the date and time it was

* If no connection was made (i.e., the call was not answered), no elapsed time was reflected.

made. The pen register also reflected incoming calls and their length, but not the point of origin. As installed, the pen register had no "audio output" and did not have the capacity to record actual conversations.*

On July 9, 1982, an eavesdropping warrant was signed by the Honorable James R. Cowhey permitting the overhearing and recording of certain telephonic communications over the line and instrument listed to Vincent Gonzalez as described above. This order was issued upon the application of District Attorney Carl A. Vergari and the affidavit of Detective Andrew Panessa in support thereof. Detective Panessa's affidavit was based upon physical surveillance, pen register surveillance, information from confidental informants (identified as CI-1, CI-2, CI-3, CI-4), information conveyed by Detective Curasi (described as acting in an "undercover capacity"); as well as personal knowledge and experience relating to illegal narcotics operations.

By way of a pre-trial motion, Gonzalez sought, *inter alia,* suppression of all evidence derived from the aforementioned wiretap. The bulk of the motion was devoted to a claim that Detective Panessa's affidavit in support of the eavesdropping warrant contained false information, "known at the time to the District Attorney to be untrue," essential to a finding of probable cause.** Specifically, defendant focused upon Panessa's recitation of information attributed to CI-1, a registered informant of the Federal Bureau of Investigation who had supplied information to Special Agent Dave Clark:***

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* It was not until an eavesdropping warrent was obtained that a listening device was added and the substance of conversations was overhead.

** There was no claim that probable cause was not established within the four corners of the warrant.

***Panessa never personally met nor directly spoke to this individual.

> CI-1 stated that Vincent "Tut" Gonzalez, William Nicastro and Frank Spinelli met two or three times a month, at which times a transfer of cocaine (ounces) occurs. Spinelli supplies it to Gonzalez and Nicastro, and the meetings take place at the Bottoms-up Bar, 10 South Division Street, New Rochelle, New York. One meeting occurred in March, 1982 at the Bottoms-up Bar. At this time, Spinelli delivered approximately seven ounces of cocaine to Gonzalez and Nicastro. CI-1 did not state whether money was transferred at that time. The basis for CI-1's information is personal knowledge in that he saw the transaction, overhead conversation and heard admissions from Gonzalez and Nicastro concerning the transfers and meetings. Gonzalez, Nicastro and Spinelli were all known to CI-1 before these transactions, and Gonzalez is known by him to use the name Tut.

The defense contended that "no such transaction took place in March of 1982," and, in fact, Spinelli was in federal custody at that time. Further, it was claimed that the Office of the District Attorney was aware of Spinelli's federal incarceration in March 1982 due to the fact that Spinelli also had a pending Westchester County indictment (Indictment No. 80-00234) to which he entered a plea of guilty on March 23, 1982, and was sentenced to ninety days concurrent with his federal sentence.

The motion also challenged that portion of the Panessa affidavit referring to information developed by Detective Robert Curasi while working in an "undercover capacity" at the Pelham Meateria, claiming Detective Curasi was in fact moonlighting at the Pelham Meateria and was known to everyone to be a police officer.

Upon submission of opposition papers, a pre-trial hearing was ordered. In accordance therewith, an extensive

hearing was held (commencing on October 18, 1983, continuing on various dates and concluding on January 6, 1984), at which petitioner was afforded a full and adequate opportunity to explore the facts at issue.*

With respect to that portion of Panessa's affidavit relating information conveyed by CI-1, the detective testified that on March 12, 1982, he was told by Special Agent David Clark of the Federal Bureau of Investigation, New Rochelle Branch, that Clark had received information from a reliable confidential informant** concerning two individuals, Tut Gonzalez and William Nicastro, who were operating a disco on South Division Street in New Rochelle called "Bottoms-Up." Said individuals were, according to the informant, involved in "an operation of distribution of cocaine": the source of the supply was one Frank Spinelli. Spinelli would supply Gonzalez and Nicastro with several ounces of cocaine two or three times a month. The informant told Clark that on occasions when he observed Spinelli at the "Bottoms-Up" Bar he usually drove a Ford Mustang and wore his hair differently on different occasions. During the same conversation, Agent Clark stated that according to the informant Nicastro and Gonzalez were to receive up to eight ounces of cocaine on March 13 or 14, and that the informant would get in touch with the agent if in fact the transaction occurred. Panessa interpreted the conversation as indicating Spinelli would deliver the drugs. Detective Panessa further testified that he again spoke to Agent Clark on March 16, 1982. His recollection was that during said conversation Agent Clark told him that, according to the aforementioned informant, six or seven ounces of cocaine had in fact been delivered by Spinelli to William Nicastro and Tut Gonzalez at the "Bottoms-Up" bar on Saturday night, March 14.

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*Petitioner does not claim that the hearing was in any way deficient.

** Agent Clark supplied information regarding the informant's reliability, which was included in the Panessa affidavit. The informant was in fact "registered" with the FBI.

Thus, the testimony of the affiant officer did not contradict that set forth in the supporting affidavit.

Special Agent Clark of the FBI was also called as a witness by the prosecution. According to his testimony, the allegations set forth in Panessa's affidavit varied from the information actually conveyed by Clark to Panessa in the following respects:

(1) Clark testified that he had not told Panessa that Gonzalez received cocaine from Spinelli when Spinelli delivered cocaine to Nicastro; (2) Clark testified that he had not told Panessa that, according to CI-1, Gonzalez would be present at the March 1982 meeting; (3) Clark testified that CI-1 did not know who the source of cocaine would be at the March 1982 meeting; and thus did not say Spinelli would be present. However, in light of Clark's testimony, there was a reasonable basis for Panessa to believe that the information as set forth in his affidavit was true. Clark did tell Panessa that, according to CI-1, Gonzalez and Nicastro were close associates in the distribution of cocaine, and Gonzalez was aware of the "drop" that was to occur on the weekend of March 12, 1982. It was Clark's understanding that Gonzalez would be present when the cocaine was delivered. Spinelli had delivered quantities of cocaine to Nicastro at Bottoms-Up on a regular basis for over a year, and CI-1 had stated that he had been present on occasions when Spinelli had delivered cocaine to Nicastro.

Certified records of the United States Department of Corrections were introduced into evidence at the hearing to show that Frank Spinelli had in fact been in federal custody from February 2, 1982, until November 5, 1982; thus, he could not have been present at a March 1982 delivery of cocaine as set forth in the Panessa affidavit. Detective Panessa, however, testified that at the time he executed his affidavit, he was unaware of this fact.* Prior

* Special Agent Clark also testified that he had no knowledge prior to August 1982 that Spinelli was incarcerated during any portion of that year.

to executing the affidavit, the detective had examined an FBI rap sheet and a New York State rap sheet, neither of which reflected Spinelli's incarceration. The FBI rap sheet was obtained from the records of the New Rochelle Police Department; the New York State rap sheet was obtained between March 12 and March 16, 1982.* The New York State rap sheet indicated an arrest in Harrison for "possession of a weapon" but no disposition. That arrest was not mentioned in the affidavit as there was no conviction listed.

A number of witnesses were called to establish what, if any, knowledge members of the Westchester County District Attorney's Office had with respect to Spinelli's incarceration during March 1982. Assistant District Attorney John George testified that in May 1981 he was assigned to prosecute Indictment Number 82-235, *People v. Frank Spinelli,* involving an arrest by the Harrison Police Department on a weapons charge. In October 1981, Assistant District Attorney George became aware of the fact that there was a pending federal case against Spinelli. In late December 1981, Assistant District Attorney George was advised that Spinelli had entered a plea of guilty to his federal indictment and was free on bail pending sentence on February 2, 1982. Assistant District Attorney George was thereafter advised that sentence had been imposed and Spinelli was being held in the Metropolitan Correctional Center in Manhattan. The prosecutor then took various steps to have Spinelli returned to Westchester County for disposition of his pending indictment in that county. A writ was secured, and on March 23, 1982, Spinelli was brought to Westchester County, entered a plea of guilty, and was sentenced to 90 days' imprisonment concurrent with his one-year federal sentence, and returned to Metropolitan Correctional Center.

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* Panessa testified that the purpose of procurring Spinelli's rap sheets was "to check his criminal history, to see if there was any pending arrest, or to make sure that he wasn't in jail."

The witness testified that he discussed the disposition of the *Spinelli* case with First Deputy District Attorney Anthony Molea in March 1982. The discussion pertained solely to numerous legal problems and the possibility of a misdemeanor disposition. The pending Spinelli indictment was not discussed with any member of the Rackets Bureau (which was in charge of the Gonzalez investigation) of the District Attorney's Office, District Attorney Carl A. Vergari, or any New Rochelle police officer.* Assistant District Attorney George was not aware of the investigation being conducted by Detective Panessa and Assistant District Attorney Thomas E. Bisordi, Rackets Bureau, which led to Gonzalez's indictment.

With respect to that portion of Panessa's affidavit which referred to New Rochelle Detective Curasi as working in an "undercover capacity" at the Pelham Meateria, Detective Panessa explained his use of this label as follows:**

> The reason why that term was used, my Supervisor, Detective Sergeant Edward Sheehy, has a policy of any time a police officer receives information and he's off duty, he's in an undercover capacity. It is a policy he has. He has the power within the department to set policies like that within his unit.

Former Assistant District Attorney Thomas Bisordi also indicated that a decision was made to adopt the New Rochelle Police Department's "undercover" terminology when drafting the eavesdropping affidavit.

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* This fact was confirmed by testimony elicited from Assistant District Attorney Molea and members of the Rackets Bureau involved in the instant investigation.

** Detective Curasi was moonlighting as a butcher at the Meateria; his employer was aware of the fact that Curasi was also employed as a police officer.

POINT I

The application of the *Franks v. Delaware* doctrine to the facts of this case rested upon a credibility determination in the trial court. No constitutional issue is presented for this Court's review.

In the landmark case of *Franks v. Delaware,* 438 U.S. 154, the United States Supreme Court rejected the position that a defendant may under no circumstances challenge the veracity of a sworn statement used by the police to procure a search warrant. Such a rule, it was held, would denude the probable-cause requirement of any real meaning. The guiding principle was thus articulated as follows:

> [W]here the defendant makes an substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit (*supra* at 155-6).

These principles were properly applied in the case at bar. Based upon the allegations set forth in the defendant's moving papers, an extensive evidentiary hearing, at which all the relevant issues were fully explored, was in fact held.* At the conclusion thereof, the presiding judge

* There was no contention that the hearing was in any way inadequate.

expressly found all the prosecution witnesses to be credible. The discrepancies between the information regarding the March meeting imparted to Clark by CI-1 and conveyed to Panessa, and that set forth in the Panessa affidavit, were found to be "attributable to the relaying of information through various persons." "The distortions arose from the conveyance of information and not from lying or willful or reckless disregard for the truth" (A10).* The court further refused to adopt a theory of "imputed knowledge" with respect to Spinelli's incarceration, and held that the facts as set forth in his affidavit were as Panessa reasonably believed them to be. Finally, the court ruled that the reference to Detective Curasi as "undercover" was not a falsehood (A12-13). The state appellate court ruled that "the record supports the determination that defendant failed to meet his burden of proof, by a preponderance of the evidence, that a police officer's affidavit in support of the application for an eavesdropping warrant contained perjured inaccuracies or misstatements made with a reckless disregard for the truth" (A2).

Petitioner's disagreement with the result does not amount to a Constitutional claim worthy of review. The *Franks* rule clearly requires a specific *mens rea* on the part of the affiant officer: a finding the trial court, after hearing and observing the witness, refused to make. Rather, the only issue, once a full hearing was held as directed by *Franks*, was a credibility determination solely within the province of the trial court (see *People v. Wright*, 71 A.D.2d 585, 586; *People v. Mendez*, 75 A.D.2d 400, 404).

The standard to be applied upon a challenge to the veracity of statements in an affidavit in support of a warrant has been fully set forth in *Franks v. Delaware;* the application to the precise facts of this case does not warrant review by this Court.

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* Referring to pages of petitioner's appendix.

POINT II

This Court has clearly held that the installation and use of a pen register is not a "search" within the meaning of the fourth amendment, and hence no warrant is required (*Smith v. Maryland*, 442 U.S. 736).

The United States Supreme Court in the case of *Smith v. Maryland*, 446 U.S. 736, held that the installation and use of a pen register is not a "search" within the meaning of the fourth amendment, and hence no warrant is required. In so ruling, the Court determined that an individual could claim no "reasonable expectation of privacy" (see *Katz v. United States*, 389 U.S. 347*) in information voluntarily turned over to the telphone company.

The pen register at issue had no features which would remove it from the purview of this rule. As to outgoing calls, the instant pen register furnished the police with no more information than Gonzalez voluntarily gave to the telephone company: the telephone company commonly keeps track of the length of calls, numbers dialed, date and time, and whether or not a connection was made. The fact that this pen register also reflected incoming calls and their length (but not point of origin) in of no moment. The telephone company can, if it chooses, determine the existence of incoming calls, their length, and even point of origin (via a telephone "trace"). Thus, the "expectation of privacy" is no different. The fact that the telephone

* In *Katz*, the Supreme Court held that a fourth amendment "search" occurred where government agents had intercepted the *contents* of a telephone conversation by attaching a listening device to the outside of a public telephone booth. In distinguishing *Katz*, the Court in *Smith* held:

> [A] pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the contents of communications (*supra*, at 741).

company chooses to bill on an out-going basis should not make a "constitutional difference" (see, *Smith v. Maryland, supra,* at 745).

Nor should the employment of a "lease line," which ran from one of the appearances for the Gonzalez telephone line to a plant where the pen register was located, alter the analysis. There is nothing in the language of the *Smith* decision or subsequent case law which so limits the rule of law. The information obtained and the expectation of privacy is the same regardless of the actual location of the pen register. It is the type of information, not the location of the pen register, which is determinative.

As installed, this pen register has no "audio output" and did not have the capacity to record actual conversations. Thus, under established law, the fourth amendment was not triggered,* and the content of the affidavit supporting the court order (which was not constitutionally required) becomes irrelevant.** Police officers should not be penalized, or their actions subjected to greater scrutiny, for seeking judicial approval when none is needed.

The governing rule having been already established by this Court, review in this case is unwarranted.

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* The fact that the New York telephone company, as a matter of company policy, requires a court order before they will provide information or a lease line does not create a fourth amendment issue or implicate the exclusionary rule.

** In the case at bar, a court order was in fact obtained. However, the state courts did not reach the issue of whether probable cause was established (see A2-3, A14-17).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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